

**STATE OF INDIANA  
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

<b>IN THE MATTER OF</b>	)	
<b>THE PERMIT OF</b>	)	
	)	
<b>WAL-MART STORES EAST, LP</b>	)	
<b>d/b/a WAL-MART SUPERCENTER #1263</b>	)	<b>PERMIT NO. DL82-21036</b>
<b>401 N. BURKHARDT ROAD</b>	)	
<b>EVANSVILLE, INDIANA 47715</b>	)	
	)	
<b>Applicant.</b>	)	

**PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. BACKGROUND OF THE CASE**

Wal-Mart Stores East, LP, d/b/a Wal-Mart Supercenter #1263, 401 North Burkhardt Road, Evansville, Indiana 47715, permit number DL82-21036 (the “Applicant” or the “Wal-Mart”), is the Applicant for a type 208-3<sup>1</sup> Alcohol and Tobacco Commission (the “Commission” or the “ATC”) permit. The application was assigned to the Alcoholic Beverage Board of Vanderburgh County (“Local Board”). The Local Board held a hearing on June 14, 2004, and voted 3-1 with respect to this permit. On July 20, 2004, the Commission voted to deny the application at its regularly held meeting.

On August 12, 2004, the Applicant filed Petitioner’s Request for Administrative Review and Request to Appeal Commission’s Denial of Application, and the matter was assigned to the Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on February 6, 2007, and that time, witnesses were sworn, evidence was heard, and the matter was taken under advisement. The Hearing judge also took judicial notice of the entire contents of the file related to this cause. Having been duly advised of the facts and law

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<sup>1</sup> Liquor, beer and wine (drug store) dealer located in an unincorporated area.

at issue, the Hearing Judge now submits these Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

## **II. PROCEDURAL HISTORY**

1. On August 5, 2004, the Applicant received the Notice of Denial stating that the Commission rejected its application.

2. On August 12, 2004, the Applicant timely filed Petitioner's Request for Administrative Review and Request to Appeal Commission's Denial of Application within the fifteen (15) day deadline required by 905 IAC 1-36-2.

3. No remonstrators filed a petition for intervention as remonstrator, as required by 905 IAC 1-36-2.

4. On or about April 19, 2005, the Applicant filed its Motion for Reconsideration of the Commission's decision to deny the application.

5. On July 19, 2005, the Applicant filed Petitioner's Motion for Pre-Hearing Conference.

6. On August 1, 2005, the Hearing Judge issued an Order staying the administrative proceedings pending the Indiana Supreme Court's decision in the appeal of *Ind. Ass'n of Beverage Retailers, Inc. v. Ind. Alcohol and Tobacco Comm'n*, 809 N.E.2d 374 (Ind. Ct. App. 2004).

7. On October 27, 2005, the Indiana Supreme Court issued its decision in *Ind. Ass'n of Beverage Retailers, Inc.*, 836 N.E.2d 255 (Ind. 2005). The Supreme Court held that to pursue an administrative or judicial review of a Commission action, a person must first demonstrate standing as an aggrieved or adversely affected person in accordance with the Commission's rules.

8. On November 17, 2005, the Applicant filed a Motion for Reconsideration of the Commission's denial of the application, citing the decision in *Ind. Ass'n of Beverage Retailers, Inc.*

9. On June 20, 2006, the Commission denied the Applicant's Motion for Reconsideration at its regularly held meeting.

10. On September 20, 2006, the Applicant filed Petitioner's Motion for Administrative Review and Request for the Issuance of Findings of Fact.

11. On September 21, 2006, the Hearing Judge issued an Order setting a pre-hearing conference date, denying the Applicant's motion for reversal of the Commission's decision, and finding the Applicant to be the only party to this appeal.

12. On September 21, 2006, a pre-hearing conference was held.

13. On September 27, 2006, the Hearing Judge issued an Entry Regarding Pre-Hearing Conference, scheduling a hearing date of October 31, 2006.

14. On October 26, 2006, the Applicant filed Petitioner's Request for Continuance.

15. On October 27, 2006, the Hearing Judge issued an Order continuing the hearing to January 4, 2007.

16. On December 7, 2006, the Applicant filed its Witness List.

17. On December 18, 2006, the Applicant filed a second Petitioner's Request for Continuance.

18. On December 21, 2006, the Hearing Judge issued an Order continuing the hearing to February 6, 2007.

19. On February 6, 2007, the Hearing Judge conducted a hearing regarding this appeal.

### III. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

1. Lisa Goldner, attorney for the Applicant;
2. Darrell Weitzel, Wal-Mart Store Manager;
3. Cheree Madding, Wal-Mart employee; and,
4. Michelle Pierce, Wal-Mart employee.

B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

1. Manager's Statement by Darrell Weitzel, Store Manager, June 14, 2004;
2. Exhibit 1 - Indiana Board of Pharmacy Permit, issued July 14, 1997;
3. Exhibit 2 - Photographs of the Wal-Mart;
4. Exhibit 3 - Affidavit of Compliance Regarding Notice Posting, June 3, 2004;
5. Exhibit 4 - Vanderburgh County Property Tax Clearance Form No.1, January 12, 2004;
6. Exhibit 5 – Petitions in Support of the Applicant containing 706 customer signatures, with 96% in favor of the application;
7. Exhibit 6 - Summary of Alcohol Management Lesson;
8. Exhibit 7 - Alcoholic Beverage Signage, "Wal-Mart Adheres to the Following State and Federal Laws," English version;
9. Exhibit 8 – Alcoholic Beverage Signage, "Wal-Mart Adheres to the Following State and Federal Laws," Spanish version;
10. Exhibit 9 – Alcoholic Beverage Signage, "Indiana Alcoholic Beverage Limits";
11. Exhibit 10 – *Wal-Mart tops Fortune 500 list for 3<sup>rd</sup> straight year*, The Indianapolis Star, March 22, 2004;
12. Exhibit 11 - *Supporting our Service Men and Women*, 2004 Annual Report Excerpt;
13. Exhibit 12 – Economic Impact Report, Indiana Statewide Figures, financial figures representing the impact and benefits derived from Wal-Mart;
14. Exhibit 13 – Report of Local Vendors Utilized by Wal-Mart No. 1263 in 2003; and,
15. Exhibit 14 – *Thank you, America, for remembering*, News Reprint, May 2004.

C. The following individuals testified before the Local Board against the Applicant in this cause:

1. Steve Bagby, City Council President, Evansville, Indiana;
2. Michael Lockard, a resident of Evansville, Indiana;
3. Paul Green, Electrical Workers Union Member; and,
4. Jim Shank, Carpenter's Union Member.

D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

1. Exhibit 1 – Map outlining number of alcoholic beverage permits within 1 mile of Applicant;
2. Exhibit 2 – Map outlining number of alcoholic beverage permits within zip code 47715;
3. Exhibit 3 – Indiana Administrative Code, 905 IAC 1-27-4; and,
4. Exhibit 4 – Summary of Impact of such services on the neighborhood or community.

#### **IV. EVIDENCE BEFORE THE COMMISSION**

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Larry Marschel, Store Manager. The Applicant desires to offer “one-stop shopping” to its customers, who regularly request that the Applicant sell liquor in addition to beer and wine. The Applicant has implemented extensive training measures for all of its employees to ensure compliance with all alcoholic beverage laws, which include a zero-tolerance policy with automatic termination for violating an alcoholic beverage law. The Applicant utilizes a state-of-the-art security system and salaried loss prevention asset protection coordinator. The Applicant’s employees also deter theft by monitoring the aisle in which alcoholic beverages are shelved, and implementing the “10-Foot Rule,” which requires employees to make eye contact and greet every customer within ten feet of the employee. The Applicant makes charitable contributions to the local community. There is a need and desire for the permit, and the Applicant is a store of good repute in the community.

2. Mike Owen, Market/Grocery Merchandiser. The Applicant desires to offer “one-stop shopping” to its customers in an effort to improve service to the community. Use of the “10-Foot Rule,” facilitates communication with Wal-Mart customers. The Applicant’s employees also deter theft by monitoring and stocking the aisle in which alcoholic beverages are shelved twenty four (24) hours per day.

3. Steve McCarty, Asset Protection Coordinator. Mr. McCarty monitors and oversees shrinkage within the store. The Applicant implemented a new state-of-the-art DVR security system. The Applicant employs off-duty law enforcement officers to serve as security in the store. Shrinkage of alcoholic beverages is very low compared to other items in the store. There have been no investigations related to shrinkage of alcoholic beverages; and, no substantial loss of alcoholic beverages related to theft. Shrinkage is more likely to be attributable to damage than theft.

4. Lisa Goldner, attorney for the Applicant.

5. Alex Intermill, attorney for the Applicant.

B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Exhibit A - Manager's Statement by Larry Marschel;
2. Exhibit 1 – Petitions collected prior to the ATC Hearing containing 1,511 customer signatures, with 97% in favor of the permit application;
3. Exhibit 2 - *Wal-Mart is Now Indiana's Top Employer*, [www.insideindianabusiness.com](http://www.insideindianabusiness.com) (last visited February 3, 2006);
4. Exhibit 3 – *Indiana Alcohol Quantity Limits*, stating that Indiana law restricts the amount of alcohol customers/members can purchase in a single transaction, <http://mywire-wal-mart.com> (accessed April 4, 2006);
5. Exhibit 4 - Signage depicting state and federal alcoholic beverage laws displayed in aisles containing alcoholic beverages;
6. Exhibit 5 - Statistics showing Wal-Mart's positive impact on Indiana, [www.walmartfacts.com](http://www.walmartfacts.com) (accessed February 5, 2007);
7. Exhibit 6 – *Wal-Mart Saves Working Families \$2,329 Per Year; Has Net Positive Impact on Real Wages and Job Creation*, Press Release, (November 4, 2005);
8. Exhibit 7 – *Nation's Best Educators Honored in Wal-Mart's 11<sup>th</sup> Annual Teacher of the Year Program*, [www.walmartfacts.com](http://www.walmartfacts.com) (Last Updated October 30, 2006);
9. Exhibit 8 – *Statement on Poll Showing Americans Believe Wal-Mart is a Good Place to Shop*, [www.walmartfacts.com](http://www.walmartfacts.com) (December 15, 2005);
10. Exhibit 9 – Summary detailing Wal-Mart's policy on charitable giving;
11. Exhibit 10 – Summary of 2006 Donations, Grants, and Contributions for Wal-Mart Supercenter #1263;
12. Exhibit 11 – Population Change in Vanderburgh County from April 200 to July 2005, U.S. Census Bureau, Indiana Business Research Center (March 2006);

13. Exhibit 12 – Census 2000 Population Compared to 1990, U.S. Census Bureau, STATS Indiana (March 9, 2001);
14. Exhibit 13 – Summary of Largest Cities and Towns in Indiana (35,000+), Source Unknown;
15. Exhibit 14 – Quotas for Cities Within Vanderburgh County, Indiana, Census 2000 obtained from ATC (November 15, 2006);
16. Exhibit 15 – Driving directions and distance between 5019 Shady Court, Evansville, Indiana and 401 North Burkhardt Road, Evansville, Indiana, [www.mapquest.com](http://www.mapquest.com).

C. The following individuals testified before the Commission against the Applicant in this cause:

1. Michael Lockard, a resident of Evansville, Indiana. Mr. Lockard attended the Local Board Hearing and testified in opposition to the permit. Mr. Lockard testified that he believes there is no need for the permit, as the current alcoholic beverage outlets in close proximity are sufficient for the residents of the community. Mr. Lockard believes Wal-Mart has a damaged reputation in the community because of an incident involving the killing of a stray cat on the premises. Mr. Lockard referenced the ATC appeal for *American Oil Company, Inc.*, Permit No. DL49-18873 (2005) which states, “[w]here the choice for the product is slim or nil, that will usually show a need, which would shift the burden to remonstrators to show that there are alternatives, or that whether or not need exists, there is simply no desire for the product.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

1. Remonstrator’s Exhibit Binder, *Wal-Mart East Liquor Permit Remonstrance*:
  - a. Tab 1 – Index;
  - b. Tab 2 – Slide presentation, *Remonstrance Against the Wal-Mart Alcohol Permit Request*;
  - c. Tab 3 – Maps outlining the proliferation of permits in proximity to Wal-Mart, [www.microsoft.com/streets](http://www.microsoft.com/streets).
  - d. Tab 4 – *Request for Administrative Review Rebuttal*;
  - e. Tab 5 – Portion of the Local Board Hearing transcript;
  - f. Tab 6 – Statistics for Vanderburgh County and Indiana relating to underage drinking;
  - g. Tab 7 – Summary of costs associated with underage drinking;

- h. Tab 8 – *Wal-Mart wants to sell liquor*, [www.courierpress.com](http://www.courierpress.com) (May 27, 2004);
- i. Tab 9 – Summaries and articles relating to youth alcohol issues; and,
- j. Tab 10 – Additional summaries and articles relating to youth alcohol issues.

## **V. FINDINGS OF FACT**

1. Wal-Mart Stores East, LP, d/b/a Wal-Mart Supercenter #1263, 401 North Burkhardt Road, Evansville, Indiana 47715, permit number DL82-21036, is the Applicant for a Type 208-3 permit. (ATC File).
2. The Applicant meets the qualifications to hold a permit pursuant to Ind. Code § 7.1-3-4-2, Ind. Code § 7.1-3-5-2, Ind. Code § 7.1-3-10-2 and Ind. Code § 7.1-3-15-2. (Local Board Hearing; ATC Hearing).
3. The Applicant maintains a reputation for decency and law obedience in the community in which it conducts business. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10. (ATC Hearing).
4. The permit is not being placed within two hundred (200) feet of a church or school. (ATC File; Local Board Hearing; ATC Hearing).
5. The permit is being placed in a commercial location and is not being placed in a residential district as referred to in Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1. (ATC File; ATC Hearing).
6. The Applicant is of good moral character and of good repute in the community as required by 905 IAC 1-27-1. (Local Board Hearing; ATC Hearing).
7. The Applicant's store is similar to stores of competitors holding alcoholic beverage permits in Indiana. (Local Board Hearing; ATC Hearing; ATC File).



8. The Applicant's employees are extensively trained to avoid problems with theft and the sale of alcoholic beverages to minors, which includes automatic termination of the employee involved on the first offense. (Local Board Hearing, ATC Hearing).

9. Five (5) persons appeared at the Local Board Hearing to remonstrate against the issuance of this permit. One (1) person appeared at the ATC Hearing to remonstrate against the issuance of this permit. (Local Board Hearing; ATC Hearing; ATC File).

10. The Applicant has presented evidence to indicate that there is need and desire in the Evansville community for the permit by submitting petitions containing (i) seven hundred six (706) signatures with 96% in favor of the permit; and, (ii) one thousand five hundred eleven (1,511) signatures of customers with 97% in favor of the permit. (Local Board Hearing; ATC Hearing; ATC File).

11. The weight of the evidence, which includes petitions submitted by the Applicant, witnesses' testimony concerning customer inquiries, and the availability of Type 208-3 permits in Vanderburgh County, indicates that there is a need and desire in the Evansville community for the Applicant to obtain the permit. (Local Board Hearing; ATC Hearing).

12. None of the remonstrators timely filed a petition for intervention as remonstrator as required by 905 IAC 1-36-2(b). (ATC Files).

13. The Applicant has submitted substantial evidence that it is qualified to hold a Type 208-3 drug store permit. (Local Board Hearing; ATC Hearing).

14. The Local Board's proffered basis for denial of the permit on the Local Board Voting Sheet was (i) 905 IAC 1-27-4(a) – "no need for services at this location"; (ii) 905 IAC 1-27-4(b) – "no desire for services at this location"; and, (iii) 905 IAC 1-27-4(c) – "the impact

of such services on other businesses in the neighborhood;; however, the Local Board's statements at the LB Hearing contradict that conclusion. (LB Hearing).

15. Although the proffered basis for denial was 905 IAC 1-27-4(a), (b) & (c), the Local Board members stated the following:

a. Frank Daugul stated

- (1) "[Wal-Mart] can't be everything to everybody...you have driven a lot of people out of business, a lot more than you've ever hired. That's why I'm sort of proud of the communities that said no to you";
- (2) "I get hearsay also from Excise officers...that Wal-Mart is not a cooperative citizen with the ATC, in inspections." Although he alleged Wal-Mart is not cooperative with Excise, he would not disclose the source of that information and the allegation was not supported by Officer Scott Bedwell; and
- (3) "I don't understand the reasoning behind...[calling it] a drug store/pharmacy permit and [putting the liquor] 200 feet away...I have a problem with that."

b. Rick Riney stated

- (1) "I don't understand the fact that the liquor is not in the drug store part of the store. I have a problem with that."; and,
- (2) "...if you're portraying yourself as a good corporate citizen and [Wal-Mart has] been having all these problems building all these [stores], how is that a good corporate citizen and why should that not bear in the vote?"

- c. Ron Cosby made no statements on the record; and
  - d. Scott Bedwell voted to approve issuance of the permit.
16. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

## **VI. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.
2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.
3. The Commission is authorized to act upon proper application. *Id.*
4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).
5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission, including a public hearing and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).
6. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).
7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10.

8. The permit location is not in a residential district. Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1.

9. The permit location is more than 200 feet from a church or school. Ind. Code § 7.1-3-21-10 and Ind. Code § 7.1-3-21-11.

10. The Applicant is not disqualified from holding an ATC permit. Ind. Code § 7.1-3-4-2; Ind. Code § 7.1-3-5-2 and Ind. Code § 7.1-3-15-2.

11. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

12. The weight of the evidence indicates that there is a need and desire in the community to receive the services of this Applicant. *Id.*

13. Indiana law charges the Commission with ensuring that laws and regulations are enforced uniformly throughout the state. Ind. Constitution, Art. IV, Sec. 23; *See, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

14. To deny the application to this Applicant while granting other similarly situated applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.

15. The recommendation of the Local Board was not based on substantial evidence. (Local Board Hearing; ATC Hearing).

16. The Commission may reverse a local board's action in denying an application for a permit if it finds that the local board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority,

limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.

17. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Vanderburgh County Local Board resulting in a 3-1 vote concerning the application for the permit number DL82-21036 was not supported by substantial evidence, was arbitrary and capricious, and otherwise not in accordance with law, and the Indiana Alcohol and Tobacco Commission should approve said application. The application of Wal-Mart Stores East, LP, d/b/a Wal-Mart Supercenter #1263, 401 North Burkhardt Road, Evansville, Indiana, 46375 for the Type 208-3 permit number DL82-21036, was sufficient and the permit applied for herein is GRANTED.

DATE: March 27, 2007

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U-Jung Choe, Hearing Judge